IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.GIRI

MONDAY, THE 13TH AUGUST 2007 / 22ND SRAVANA 1929

OP.No. 10869 of 2002(R)

PETITIONERS:
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1. **JAMES P., HOSPITAL ATTENDANT GRADE-II,**
   PRIMARY HEALTH CENTRE, OMALLOOR,
   PATHANAMTHITTA DISTRICT.

2. **SYAMALA KUMARI K.,**
   HOSPITAL ATTENDANT GRADE-II,PRIMARY HEALTH CENTRE,
   PURAMATTOM, PATHANAMTHITTA DISTRICT.

3. **SHAJI P.G.,HOSPITAL ATTENDANT GRADE-II,**
   COMMUNITY HEALTH CENTRE, RANNI, PERINADU.

4. **VISWAMBARAN V.,**
   HOSPITAL ATTENDANT GRADE-II,PUBLIC HEALTH CENTRE,
   GENERAL HOSPITAL, PATHANAMTHITTA.

5. **VENUGOPALAN N.A.,**
   HOSPITAL ATTENDANT GRADE-II,PRIMARY HEALTH CENTRE,
   KUNNANTHANAM.

6. **SUKUMARI K.R.,**
   HOSPITAL ATTENDANT GRADE-II,PRIMARY HEALTH CENTRE,
   KUTTAPUZHA.

7. **RETNAMMA P.,HOSPITAL ATTENDANT GRADE-II,**
   PRIMARY HEALTH CENTRE, PRAMADOM.

8. **MURALEEDHARAN NAIR P.V.,**
   HOSPITAL ATTENDANT GRADE-II, GENERAL HOSPITAL,
   PATHANAMTHITTA.

9. **SOSAMMA GEORGE,**
   HOSPITAL ATTENDANT GRADE-II,PRIMARY HEALTH CENTRE,
   GENERAL HOSPITAL, PATHANAMTHITTA DISTRICT.

10. **SUKUMARI P.T.,**
    HOSPITAL ATTENDANT GRADE-II,PRIMARY HEALTH CENTRE,
    CHENNERKARA, PATHANAMTHITTA.

11. MARYKUTTY P.ABRAHAM,
HOSPITAL ATTENDANT GRADE-II,PRIMARY HEALTH CENTRE,
CHENNERKARA, PATHANAMTHITTA DISTRICT.

12. C.KRISHNANKUTTY,
HOSPITAL ATTENDANT GRADE-II, GENERAL HOSPITAL,
PATHANAMTHITTA.

13. PRASAD K.N.,HOSPITAL ATTENDANT GRADE-II,
PRIMARY HEALTH CENTRE,SEETHATHODU.

14. REJI S.RAJAN,HOSPITAL ATTENDANT GRADE-II
PRIMARY HEALTH CENTRE, VADASERIKKARA.

BY ADV. SRI.P.SANKARANKUTTY NAIR
SRI.T.V.AJAYAKUMAR

RESPONDENTS:
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1. STATE OF KERALA, REPRESENTED BY ITS
SECRETARY, DEPARTMENT OF HEALTH, SECRETARIAT,
THIRUVANANTHAPURAM.

2. THE DIRECTOR,OFFICE OF THE HEALTH DEPARTMENT
THIRUVANANTHAPURAM.

3. DISTRICT MEDICAL OFFICER,PATHANAMTHITTA.

BY GOVERNMENT PLEADER SRI.NOBLE MATHEW

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 13 / 08 /2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP. NO.10869/2002

ORDER ON CMP. NO.19115/2002 IN OP. NO.10869/2002

DISMISSED

13.08.2007 **SD/- V.GIRI, JUDGE**

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE ORDER DT. 30.10.01 OF THE MEDICAL OFFICER, PATHANAMTHITTA.

EXT.P2:- COPY OF THE ORDER NO. A2-8639./2000/DMOHP/DT. 5.11.01.

EXT.P3:- COPY OF THE LETTER DT. 27.1.98.

EXT.P4:- COPY OF THE LETTER DT. 23.10.97.

EXT.P5:- COPY OF THE ORDER NO.44553/97/DMOH/DT. 17.11.98.

EXT.P6:- COPY OF THE ORDER, CMP. 48978/99 IN OP. NO.28292/99 DT. 12.11.99.

EXT.P7:- COPY OF THE ORDER CMP. 51859/99 IN OP. 30441/99 DT. 3.1.2000.

EXT.P8:- COPY OF THE ORDER, CMP. 51859/99 IN OP. 30441/99 DT. 24.1.2000.

/TRUE COPY/

P.A. TO JUDGE

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V.GIRI,J.

O.P. NO.10869 of 2002

Dated this the 13th day of August, 2007

JUDGMENT

The petitioners, who were provisionally appointed as Hospital Attendant Grade II as per Ext.P1 order in various Primary Health Centres were posted in the Pathanamthitta District. The petitioners contend that though Ext.P1 order of appointment states that the appointment is temporary and is liable to be terminated on the expiry of 179 days or when regular hands join duty whichever is earlier, the said portion of Ext.P1 order is liable to be interfered with and they are entitled to be regularised in service from the date of appointment as per Ext.P1.

2. The post of Hospital Attendant Grade II is included as item-**n** in category - 4 of Special Rules for Last Grade Servants. The method of appointment to the post of Hospital Attendant Grade II is as follows:

1) 50% of the posts in the departments of Health Services, India Systems of Medicine including Ayurveda College) Homoeo, Employees' State Insurance and Medical Colleges shall be filled by promotion of part-time contingent employees in these departments concerned on the basis of seniority by the respective appointing authorities.

ii) The remaining 50% of the posts in the department specified under item (1) above shall be filled up by the respective appointing authorities by promotion from the candidates advised by the District Collectors from the Common seniority list of part-time contingent employees prepared on Revenue District wise basis as mentioned in

Note 1 below.

iii) in the absence of suitable hands under items O1) and (ii) above, by direct recruitment through Employment Exchange."

3. In the instant case, those persons who were sponsored by Employment Exchange, were appointed. According to the petitioners, the method of appointment was, therefore, what is provided for under item (iii) and that this could have been resorted to only in the absence of suitable hands under items (i) and (ii) above. The petitioners have a case in the writ petition that since the District Medical Officer decided to fill up the existing vacancies of Hospital Attendant Grade II by appointing Employment Exchange hands, the recruitment should have been treated as one which has been regularly made in terms of the rules. It is further contended that since the recruitment through Employment Exchange was resorted to only in the absence of suitable hands under items (i) and (ii) above, the recruitment is eligible to be treated as regularly made and consequently that portion of the order of appointment which provides for the termination of the services on expiry of 179 days is liable to be interfered with. The petitioners claim that they should be declared as having been regularly appointed in the post of Hospital Attendant Grade II and should be permitted to continue in terms of the Special Rules for Last Grade Service.

4. In the counter affidavit filed by the third respondent, reference

is made to the order of appointment, wherein it is unambiguously mentioned that the tenure of appointment is only 179 days or till regular hands join duty. Specific reference is made to the last portion of Ext.P1 order which contemplates an undertaking to be given by the appointees mentioned in Ext.P1, evincing their willingness for appointment on temporary basis for a period of 179 days and their services to be terminated on the expiry of the said period. The contention is that such undertaking in the prescribed form have been given by all the petitioners. The order of appointment makes it clear that the appointment is temporary. There is nothing in the Rules which prevent temporary appointment. In the circumstances, the petitioners are not entitled to claim either right to continue in service beyond 179 days or regularisation of appointment.

5. Learned counsel for the petitioners contends that the issue is covered in favour of the petitioners, by a judgment of the Division Bench dated 26.2.2003, in Writ Appeal 96/2000 and connected cases. An issue which is similar to the one at hand was considered in the said case. The petitioners therein were also appointed as Hospital Attendant Grade II. The orders of appointment in the said case also mentioned the tenure of appointment as 179 days or till regular hands join duty. Steps were taken in the said case to terminate the services of some of the appointees, In the case of some, orders of stay passed by the Court enabled the person to continue in service. The Division Bench ultimately

construed the orders of appointment in the background of the rules and taking note of the contentions in the counter affidavit that suitable hands were not available under items 1 and 2 of the Rules mentioned above, the Division Bench held that the recruitment, in the circumstances, must be treated as regular. Therefore, the petitioners therein were declared to have been regularly appointed and they were granted consequential benefits. In the case of some appointees, since the services had already been terminated, the Division Bench proceeded to issue a direction to reinstate such persons in service. The judgment of the Division Bench was referred to and followed by another learned judge of this Court in O.P.13259/1998.

6. Another learned judge of this Court had occasion to consider similar issue in writ petition No.36569/2005 and connected cases. The judgment is reported in **Vasanthi v State of Kerala**(2006(1) KLT 288). Learned counsel for the petitioner, particularly, refers to paragraph 7 of the said judgment, wherein it was averred that there were eligible and willing hands to be appointed against the vacancies of Hospital Attendants and, therefore, appointment of the petitioners in the said case (on a temporary basis) was irregular, and therefore, they cannot be made regular. Learned counsel would contend that therefore, the basis of the ultimate direction issued in (2006(1) KLT 288) was the factual position prevailing in the said case that the State had taken up a contention that notwithstanding the availability of a suitable candidates

to be recruited under items 1 and 2 of the rules mentioned above, candidates were recruited on a temporary basis. It was not a case where the method of appointment contemplated by item 3 should have been resorted to or was actually resorted to.

7. Learned Government Pleader contended that the judgment of the Division Bench in Writ Appeal No.96 of 1999 and connected cases was taken up by the State in a special leave petition in the Supreme Court. It is conceded at the Bar that the Supreme Court has issued notice in a special leave petition, though it is not clear whether leave has been granted as such. But again it is conceded that there is an order of stay in so far as reinstatement of those persons who were appointed temporarily and discharged from service on the expiry of 179 days. To that extent, there is a stay of enforcement of the directions of the Division Bench in Writ Appeal No.96/2000 and connected cases.

8. It would not be proper on my part to consider the prayer made by the petitioners for a declaration that they should be treated as having been recruited to service on regular basis, at this stage. No doubt, the petitioners are supported by the judgment of the Division Bench in Writ Appeal 96 of 2000. They claim that similar orders of appointment have been considered as conferring a right of regular appointment on the petitioners and therefore consequently a similar declaration may be issued in their favour. But, I cannot ignore the admitted fact that the judgment in Writ Appeal 96 of 2000 has been

taken up by the State before the Supreme Court and there is apparently an order of stay of enforcement of the directions of the Division Bench in so far as it contemplated reinstatement of those persons whose services were terminated on expiry of 179 days. It is taking note of this aspect also that the learned Judge (K.K.Denesan, Judge) has in the decision reported in **Vasanthi v State of Kerala** (2006(1) KLT 288), directed that Hospital Attendants who were appointed pursuant to being sponsored by the Employment Exchange should be permitted to continue in service but subject to the outcome of the case before the Supreme Court on the subject. The correctness of the judgment of the Division Bench is obviously pending consideration before the Supreme Court. The petitioners also claim parity of treatment with the petitioners before the Division Bench. In the circumstances, I am not inclined to accept the contention of the learned counsel for the petitioners that should be a declaration that the petitioners had been recruited on a regular basis, and therefore, their service is not liable to be terminated on the expiry of 179 days.

9. In my view, the interests of justice would be met by adopting the direction issued by the learned Judge in 2006(1) KLT 988.

10. For the reasons mentioned above, the writ petition is disposed of directing that the petitioners who were appointed as Hospital Attendants Grade II shall be permitted to continue in service, not with standing the term of appointment being confined to 179 days,

subject to the decision to be taken by the Supreme Court in the special leave petition stated to have been filed by the State against the judgment in 26.2.2003 in Writ Appeal No.96/2000 and connected cases. Needless to say, if the judgment of the Division Bench in the said case is affirmed in whole or in part by the Supreme court, the petitioners herein will be given a similar benefit as such. The petitioners will also be paid pay and allowances in the scale applicable to the post of Hospital Attendant Grade II for the period for which they have so worked. No costs.

V.GIRI, JUDGE

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V.GIRI, J.

O.P.NO.10869/2002

JUDGMENT

13/8/2007